IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No. 217 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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NRUPS CONSULTANTS PVT.LTD. - Petitioner(s)
Versus
RAO CONSTRUCTION PVT. LTD. - Respondent(s)

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Appearance :
MS MEGHA JANI for Petitioner(s) : 1,
MR DHAVAL M BAROT for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 22/03/2007

ORAL JUDGMENT

1. Present company petition has been filed by the petitioner Nrups Consultants Pvt. Ltd.U/s.433 & 434

of the Companies Act, 1956 for appropriate oder of winding up of Rao Construction Pvt. Ltd.

2. It is the contention on behalf of the petitioner that the petitioner is a Private Limited Company and functions as Corporate Advisors and Finance Consultants. At the request of the company, the petitioner agreed to offer its services for arranging working capital facility of cash credit limit upto Rs.300 lacs and Bank Guarantee upto Rs.900 lacs. The assignment inclused persistent work in the areas like identifying suitable bank, co-ordinating requisite commercial, financial and other relevant details meant in the loan proposal, preparing detailed financial proposal along with relevant financial workings, estimates as per requirement of the bank, co-ordinating with the bank for sanction of said finance with the best possible terms and conditions, assisting the company in undertaking legal formalities for execution of banking documents and disbursement of said finance by letter dated 31.08.2005, the petitioner accepted the said assignment and mentioned the professional fees which was payable as under:

i) Rs.10,000/- immediately as advance.

ii) Rs.20,000/- on submission of detailed finance proposal to the Bank.

iii) 60% of fees on sanction of bank facility.

iv) Balance amount on execution of legal documents.

3. It is the case on behalf of the petitioner that the respondent company accepted the terms of payment of professional fees as spelt out in letter dated 31.08.2005 subject to modifications as mentioned in the letter of the company dated 08.09.2005. That the company also paid professional fees of Rs.25,000/- as advance. It is submitted that Clause-2 of the aforesaid two letters mention that the petitioner will have to return the fees except Rs.20,000/- only if the credit limit is not sanctioned for any reason or the conditions for sanction are higher than the existing conditions available to the company. It is further submitted that a detailed proposal for availing of credit facility was submitted with the Union Bank of India. Senior professionals of the petitioner and office staff invested their valuable working hours and used their professional skills to prepare the proposal, to give reply to number of queries raised by Union Bank of India and

establishing the meaningful rapport between the Union Bank of India and to the respondent company. It is submitted that as a result of the relentless efforts put in by senior professionals of the petitioner, Union Bank of India has sanctioned credit proposal for fund based limit of Rs.3 crores and non-fund bases limit of Rs.9 crores. It is submitted that 'in principal' approval was accorded by the bank vide letter dated 03.02.2006. That the respondent company responded to the aforesaid letter immediately by writing a letter dated 07.02.2006. As per the petitioner, the only request made by the respondent was charging of concessional rate or concession for issuance of Demand Draft/Pay Orders. That thereafter further discussions took place between the Union Bank of India and the respondent and by letter dated 01.05.2006, the Union Bank of India conveyed their sanction on the terms and conditions as mentioned therein. The Union Bank of India granted sanction to fund based facility of cash credit hypothecation of Rs.3 crores and non-fund based limit i.e. letter of Guarantee to the extent of Rs.8 crores. It is the case on behalf of the petitioner that the terms and conditions of the sanction were far better than the existing rates which were offered by the State Bank

of India with whom the respondent was banking and also the requirement as specified by the respondents in its written acceptance and agreement. It is also further the case on behalf of the petitioner that the respondent had agreed that full professional fees of the petitioner will be payable if the terms at which the credit limit is sanctioned is better than the existing with the State Bank of India. It is the case on behalf of the petitioner that though the offer of the Union Bank of India was far better than the facilities offered by the State Bank of India, which was made payable, still surprisingly vide letter dated 03.05.2006, the respondent company raised certain baseless grievances and demanded yet better terms. The aforesaid request was not acceptable to the Union Bank of India as is mentioned in its letter dated 25.05.2006. The respondent company vide its letter dated 16.06.2006 demanded Rs.15,000/- back. The petitioner raised a bill of Rs.11,50,460/- as per the terms agreed between the parties and sent the same vide letter dated 15.07.2006. A remainder was sent vide letter dated 26.07.2006. The respondent company by letter dated 31.07.2006, for the first time said that the credit facilities were required to be sanctioned for all the

three group companies. As the aforesaid amount was not paid the petitioner vide notice addressed by its lawyer dated 15.09.2006 demanded Rs.11,25,460/- with interest @ 18% p.a. from 21.07.2006 till payment within three weeks from the date of receipt of the notice. The respondent through their advocates gave a evasive reply dated 04.10.2006 as aforesaid amount has not been paid within the stipulated time. The respondent company vide its letter dated 16.06.2006 demanded Rs.15,000/- back. It is submitted on behalf of the petitioner that the respondent company has failed and neglected to make payment due to the petitioner and the company is indebted to the petitioner and the company is in involved circumstance and is unable to pay its debt. It is submitted that the company has lost its financial substratum and therefore, the present company petition has been filed for an appropriate order for winding up of respondent company.

4. Relying upon various correspondences and more particularly the letter dated 31.08.2005 and the subsequent correspondence between the parties, Shri Kavina learned Advocate appearing on behalf of the petitioner has vehemently submitted that when the

petitioner has been able to get finance with regard to the respondent company from the Union Bank of India with better terms and conditions than offered by the State Bank of India, the petitioner is entitled to their professional fees as per the agreement/contract/letter dated 31.08.2005. Relying upon the documents annexed to the petition and the various correspondence, it is submitted that it was never the terms of the contract and/or agreement that the petitioner has to manage for getting finance sanctioned qua all the three group companies and unless and until with regard to all the three group companies the finance is got sanctioned on better terms and conditions than the State Bank of India, then and then only the petitioner will be entitled for professional fees. It is submitted by Shri Kavina that the defence and/or objections raised by the respondent company are only with a view to create dispute and/or disputed question so as to avoid the payment to the petitioner. It is also further submitted that there were three different contracts for three different companies. The petitioner could manage to get finance of only respondent company and therefore, the petitioner has c**harged for only one**

contract for which, the finance was obtained. It is further submitted that it was necessary to have contract between the parties to get the finance for all the three companies and then and then only the payment should be made. It is also further submitted that looking to the financial position of the respondent company and the balance sheet if Rs.11 lacs which is to be paid to the petitioner is taken out in that case the respondent would be in a serious financial difficulties and therefore, it is requested to allow the present petition and to pass an appropriate order of winding up the respondent company.

5. Petition is opposed by the respondent company. An affidavit in reply is also filed by the respondent company. The respondent company has denied any liability and/or claim of the petitioner and the alleged debt. It is submitted that since past number of years the respondent company is banking with the State Bank of India for its financial needs. However, the petitioner company was introduced to the respondent company by a Chartered Accountant and upon introduction, the petitioner company offered to

obtain better terms and conditions of finance from any first class bank for the financial needs of the respondent company. It is further submitted that for the said purpose the petitioner company vide its letter dated 31.08.2005 offered to render services on the terms and conditions stated therein, for obtaining cash credit facility upto Rs.300 lacs and bank guarantee upto Rs.900 lacs to the respondent company and cash credit facility upto Rs.50 lacs and bank guarantee upto Rs.50 lacs to M/s.Bhavani Construction Co. (as associate firm of the respondent company) and cash credit facility upto RS.200 lacs to M/s.Saurabh Builders (an assiciate firm of the respondent company). It is also further stated that the petitioner company offered its services to arrange for cash credit facility and bank guarantee facility for the respondent company as well as for the associate firms of the respondent company. That the said terms and conditions of the said letters were not acceptable to the respondent company and therefore, the respondent company did not return duly signed duplicate copies of the said letters along with initial payments as a token of acceptance. That in reply to the three letters dated 31.08.2005 the respondent vide its common letter dated 05.09.2005

wrote to the petitioner that the respondent was interested in the cash credit of Rs.550 lacs and bank guarantee limit of Rs.1150 lacs for the three firms and the terms of payment for the services were also stated in the said reply. It is further submitted that in the event the limits specified in the letter of offer dated 31.08.2005 are not obtained or the terms and conditions are not better than the existing terms and conditions then the petitioner would be entitled to retain only a sum of Rs.10,000/- (towards Administrative Expenses) and the balance amount would be returned to the respondent. It is also further submitted that so far as the advance payment was concerned instead of an aggregate amount of Rs.45,000/- the respondent offered an aggregate sum of Rs.25,000/- for all the three firms. It is submitted that thereafter a meeting took place between the petitioner and the respondent. At the said meeting, the three letters of offer dated 31.08.2005 of the petitioner and the common reply dated 05.09.2005 of the respondent were discussed. It is submitted that the respondent vide its further letter dated 08.09.2005 quoting the three letters of the petitioner and its own letter dated 05.09.2005 and referring the meeting dated 07.09.2005 further

clarified certain issues and the respondent also forwarded a cheque of Rs.23,597/- (after deducting TDS of Rs.1403/-) to the petitioner as an aggregate advance for the three firms. It is submitted that the said letter dated 08.09.2005 was countersigned and accepted by the petitioner company. In the detailed affidavit in reply it is the contention on behalf of the respondent company that the petitioner did not manage to get the finance for all the three group companies and even could not manage to get the finance on better terms and conditions than the State Bank of India and therefore, the petitioner is not entitled to any professional fees as per the terms dated 31.08.2005 and the reply dated 05.09.2005 and 08.09.2005. It is submitted that the petitioner could not manage to get the finance on better terms and conditions than the State Bank of India for all the three group companies and therefore, there is no reason for the petitioner to accept the finance with regard to only one company as the respondent and the group companies were already having their banking with the State Bank of India and unless getting better facilities with regard to all the three group companies there was no reason for the respondent company to leave the State Bank of India. Shri Barot

learned Advocate appearing on behalf of the respondent company has submitted that the contract is required to be read as a whole and is required to be performed as a whole and for that purpose he has relied upon two English decisions i) Cutter Vs. Powell (1795) Rep. 320 and and ii) Bolton Vs. Mahadeva, The Weekly Law Reports 1972 page 1009.

6. So far as the financial position of the respondent company is concerned it is submitted in the affidavit in reply that the respondent company is a profit making company and the financial position of the company is stable and sound. Table of last five years' account of the respondent company has been produced in the affidavit in reply. It is submitted that in the year 2005-06 the turnover of the respondent company was of Rs.15,18,75,226/- and the profit before tax was Rs.49,04,562/- and the profit after tax was Rs.32,11,224/-. Therefore, it is submitted that the financial position of the respondent company is stable and sound and the respondent company has not lost its financial substratum and in view of the fact that the debt is disputed and there are bonafide dispute, it is requested to dismiss the present company petition.

7. Shri Barot learned Advocate appearing on behalf of the respondent company has further submitted that the order of winding up should be the last resort and when there are bonafide disputes raised, the company petition is required to be dismissed. It is submitted that the winding up petition should not be used as the means to recover the amount. He has relied upon the judgment of the Division Bench in the case of Tata Iron & Steel Co. Ltd. Vs. Micro Forge (India) Ltd. 2000 GLR page 1594 and therefore, it is requested to dismiss the present company petition.

8. Heard the learned Advocates appearing on behalf of the respective parties. According to the petitioner an amount of Rs.11,50,460/- is due and payable by the respondent company to the petitioner towards the professional fees for obtaining and /or getting finance sanctioned from the Union Bank of India. It is the contention on behalf of the petitioner that as a result of relentless efforts put in by the senior professionals of the petitioner, the Union Bank of India sanctioned credit proposal for fund based limit of Rs.3 crores and non-fund base limit of Rs.9 crores in favour of the respondent

company and on the terms and conditions better than the State Bank of India and therefore, they are entitled to their professional fees. Against which it is the contention on behalf of the respondent that as per the contract and the agreement between the parties, petitioner was required to get finance sanctioned with regard to all the three group companies and not with regard to only one company and as the petitioner has been able to get finance for only with regard to one company, the petitioner is not entitled to any professional fees except Rs.10,000/- towards Administrative Expenses and in fact the balance amount, which is already paid is required to be returned to the respondent company. On considering the various submissions and the correspondence between the parties as well as the pleadings in the petition and the affidavit in reply, it appears to the Court that there are bonafide dispute raised by the respondent company and there are dispute with regard to claim of the petitioner. At this stage this Court is not expressing any opinion on merits with regard to disputes raised by the respondent company and/or entitlement of any amount by the petitioner as any observation by this Court may affect either parties after the petitioner

is required to file an appropriate proceedings before the appropriate forum for recovery of its dues. It prima facie appears to the Court that there are bonafide disputes raised by the respondent with regard to entitlement of any amount by the petitioner towards the professional fees.

9. In case of Pradeshya Industrial and Investment Corporation of Uttar Pradesh Vs. North India Petro Chemical Ltd. and Another reported in 1994, Volumn (2) 3 SCC page 348 , the Supreme Court has held that, ***"A debt for the purpose of Section 433(e) of the Companies Act must be a determined or a definite sum of money payable immediately or at a future date."*** In the said Judgment,the Hon'ble Supreme Court considered the following observations of the Hon'ble Supreme Court made in ***Madhusudan Gordhandas and Co. [1972] 42 Comp.Cases 125;***

> ***"Two rules are well settled. First, if the debt is bona fide disputed and the defence is a substantial one, the court will not wind up the company. The court has dismissed a petition for winding up***

where the creditor claimed a sum for goods sold to the company and the company contended that no price had been agreed upon and the sum demanded by the creditor was unreasonable. (See London and Paris Banking Corporation, In re [1875] LR 19 Eq.444). Again, a petition for winding up by a creditor who claimed payment of an agreed sum for work done for the company when the company contended that the work had not been done properly was not allowed. (See Brighton Club and Norfolk Hotel Co.Ltd., In re [1865] 35 Beav. 204).

Where the debt is undisputed the court will not act upon a defence that the company has the ability to pay the debt but the company chhoses not to pay that particular debt. (See A Company, In re [1894] 94 SJ 369; [1894] 2 Ch 349 (Ch D)). Where, however, there is no doubt that the company owes the creditor a debt entitling him to a winding up order but the exact amount of the debt is disputed the court will make a winding up order without requiring the creditor to quantify the debt precisely. (See Tweeds Garages

Ltd., In re [1962] Ch 406; [1962] 32 Comp Gas 795 (Ch D)). The principles on which the court acts are first that the defence of the company is in good faith and one of substance, secondly, the defence is likely to succeed in point of law, and, thirdly, the company adduces prima facie proof of the facts on which the defence depends.

Another rule which the court follows is that if there is opposition to the making of the winding-up order by the creditors the court will consider their wishes and may decline to make the winding-up order. Under section 557 of the Companies Act, 1956, in all matters relating to the winding-up of the company the court may ascertain the wishes of the creditors. The wishes of the shareholders are also considered, though, perhaps, the court may attach greater weight to the views of the creditors. The law on this point is stated in Palmer's Company Law, 21st edition, page 742, as follows :

"This right to a winding-up order is, however, qualified by another rule, viz., that the court will regard the wishes of the majority in value of the creditors, and if, for some goods reason, they object to a winding-up order, the court in its discretion may refuse the order.'

The wishes of the creditors will, however, be tested by the court on the grounds as to whether the case of the persons opposing the winding-up is reasonable; secondly, whether there are matters which should be inquired into and investigated if a winding -up order is made. It is also well-settled that a winding-up order will not be made on a creditor's petition if it would not benefit him or the company's creditors generally. The grounds furnished by the creditors opposing the winding up will have an important bearing on the reasonableness of the case. (See P & J. Macrae Ltd. In re [1961] 1 All ER 302; [1961] 31 Comp Cas 424 (CA)."

It is beyond dispute that the machinery for winding up will not be allowed to be utilized merely as a means for realising its debts due from a company. In Amalgamated Commercial Traders (P.) Ltd. vs. Krishnaswami (A.C.K.)[1965] 35 Comp Cas 456, 463 (SC) this court quoted with approval the following passage from Buckley on the Companies Acts, 13th edition, page 451 :

"It is well-settled that a winding-up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the company. A petition presented ostensibly for a winding-up order but really to exercise pressure will be dismissed, and under circumstances may be stigmated as a scandalous abuse of the process of the court."

Similar view has been expressed by the Hon'ble Supreme Court in the case of ***Mediqup Systems Pvt.Ltd. [supra],*** and the Hon'ble Supreme

Court has observed that, *An order under section 433(e) of the Companies Act, 1956 is discretionary. There must be a debt due and the company must be unable to pay it.* It is further observed that, *A debt under this section must be a determined or definite sum of money payable immediately.* It is also held that if the debt is bona fide disputed and the defence is a substantial one, the court will not pass an order of winding up the company. The Division Bench of this Court also in the case of ***Tata Iron & Steel Company Ltd. v. Micro Forge (India) Ltd., [supra]*** has laid down certain general principles in a case of winding-up proceedings and after considering various decisions of the Hon'ble Supreme Court, more particularly in the case of ***Madhusudan Gordhandas & Co. vs. Madhu Woollen Industries Pvt.Ltd. [supra]; Harinagar Sugar Mills v.***

Court Receiver, H.C. Bombay, AIR 1966 SC 1707; Pradeshiya Industrial & Investment Corporation of U.P. vs. North India Petrochemicals Ltd. 1994 (3) SCC 348, the judgment of the learned Single Judge of this Court in the case of ***American Express Bank Ltd. v. Core Health Care Ltd. 1999 (96) Comp.Cases 841;*** and another decision of this Court in the case of ***Ashok Fashions vs. Magdoot Acid & Chemicals (Guj.), 1998 (91) Comp.Cases 655,*** the order passed by the learned Single Judge admitting the winding up petition came to be set aside by holding that when there exists bona fide disputes and the dues are not admitted the winding-up petition is required to be dismissed.

10. In view of the aforesaid facts and circumstances, when there are bonafide dispute raised and the debt is not admitted, present company

petition is not required to be entertained and the petitioner is to approach the appropriate Civil Court by filing a suit. Even otherwise, considering the affidavit in reply and the table of last five years' account of the respondent company, the respondent company is a profit making company. The profit has been increased every year. In the year 2001-02 the profit after tax was Rs.1,51,545/- which has been increased to Rs.32,11,224/- in the year 2005-06. In the accounting year 2005-06, the turnover of the respondent company has been mentioned as Rs.15,18,75,226/-. Considering above, it cannot be said that the respondent company has lost its financial substratum, which warrants an order of winding up.

11. For the reasons stated above and considering the bonafide dispute and when the debt itself is not admitted and even considering the financial position of the respondent company, the petitioner is not entitled to any relief as prayed for in the present petition i.e. an order of winding up of the respondent company. Under the circumstances, the present company petition is dismissed. However, in the facts and circumstances of the case, there shall

be no order as to costs.

[M.R. Shah, J.]

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